

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

REGINALD R. WILLIAMS,

Petitioner,

v.

GARY SANDOR, Warden,

Respondent.

Civil No. 10cv0665-DMS (WVG)

**ORDER GRANTING APPLICATION
TO PROCEED IN FORMA PAUPERIS
AND DISMISSING PETITION
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis. Petitioner has \$0.04 on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the above-referenced action as a poor person without being required to prepay fees or costs and without being required to post security.

However, review of the Petition indicates that it is subject to dismissal without prejudice because Petitioner has failed to allege exhaustion of state court remedies. Habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits

of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

Here, Petitioner has not indicated whether he has exhausted state judicial remedies. If Petitioner has raised his claims in the California Supreme Court he must so specify. The burden of pleading that a claim has been exhausted lies with the petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

1 The statute of limitations does not run while a properly filed state habeas corpus petition
 2 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
 3 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
 4 when its delivery and acceptance [by the appropriate court officer for placement into the record]
 5 are in compliance with the applicable laws and rules governing filings.”). However, absent some
 6 other basis for tolling, the statute of limitations does run while a federal habeas petition is
 7 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

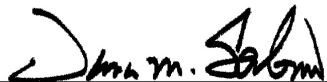
8 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
 9 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that
 10 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.
 11 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas
 12 relief because he has not alleged exhaustion of state court remedies.

13 CONCLUSION AND ORDER

14 Based on the foregoing, Petitioner’s application to proceed in forma pauperis is
 15 **GRANTED**. The Petition is **DISMISSED** without prejudice for failure to allege exhaustion of
 16 state court remedies. If Petitioner wishes to proceed with this matter, he must file a First
 17 Amended Petition which alleges exhaustion of state court remedies on or before May 28, 2010.
 18 Petitioner is cautioned that if he has not alleged exhaustion of his state court remedies before
 19 May 28, 2010, and still wishes to pursue his habeas claims in this Court, he will be required to
 20 start over by filing a new federal habeas petition which will be given a new civil case number.

21 **IT IS SO ORDERED.**

22 DATED: March 30, 2010

23 
 24 _____
 25 HON. DANA M. SABRAW
 United States District Judge

26 Copies to: ALL PARTIES
 27
 28